No. 80-722

In the Supreme Court of the United States

OCTOBER TERM, 1980

CANADIAN MOUNTAIN HOLIDAYS, LTD.,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

WENDY PAIGE BUIST,
Real Party in Interest.

Reply Brief in Support of Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

BARRY L. BUNSHOFT
PAUL D. NELSON
PAUL S. ROSENLUND
HANCOCK, ROTHERT & BUNSHOFT
100 Bush Street, Suite 1600
San Francisco, California 94104
(415) 981-5550
Counsel for Petitioner

February 18, 1981

SORG PRINTING COMPANY OF CALIFORNIA, 345 FIRST STREET, SAN FRANCISCO 94105

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I. REAL PARTY IN INTEREST'S JURISDICTIONAL ARGUMENT IS PREMISED UPON FACTS INCONSISTENT WITH THE RECORD BELOW.

Real Party in Interest's statement of the "question presented" and her argument opposing this Petition are premised upon a falsehood—her claim that CMH "solicited" the recreational business of Mr. Buist. At pages two and nine of her brief she refers to Mr. Buist's having been placed on a CMH "mailing list," implying that he engaged in business with CMH in response to mail solicitation. The uncontradicted evidence was (1) that Mr. Buist was *not* on any CMH mailing list prior to his reserving space on the

subject skiing trip, and (2) that he did *not* respond to any advertisement in making the reservation and subsequent payment. Rather than debate the meaning of the evidence, Petitioner submits herewith the uncontradicted affidavit of Hans Gmoser which sets forth all relevant facts.[1]

Petitioner is not seeking a "reweighing of the evidence," but is seeking a legal ruling which is consistent with principles of due process upon uncontroverted evidence. Real Party in Interest does not contest or distinguish the many decisions cited by Petitioner which hold that there is not in personam jurisdiction under facts as disclosed by the record herein.

II. IN PERSONAM JURISDICTION OVER A FOREIGN DEFENDANT MAY NOT BE BASED UPON ECONOMIC BENEFIT DERIVED FROM FOREIGN TRANSACTIONS.

Real Party in Interest's remaining argument is that a foreign defendant which derives "economic benefit" from Canadian business dealings with Californians should be subjected to in personam jurisdiction in California solely by virtue of its having received such benefit. (R.P.I. Br. at 8 to 12). She offers no legal authority for her position, which specifically was rejected by California's own courts in *Spirits, Inc. v. Superior Court,* 104 Cal.App.3d 918, 924, 164 Cal.Rptr. 101 (1980). See also *Star Aviation, Inc. v. Superior Court,* 73 Cal.App.3d 807, 141 Cal.Rptr. 13 (1977). Implementation of such a jurisdictional standard would remove virtually *all* limitations from the exercise of personal jurisdiction in an interstate commercial context, since all business dealings presumably are intended to derive economic benefit.

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1. In Real Party in Interest's note 2 at page eight, she refers to an undated supposed advertisement in "PSA Magazine" published by PSA airlines, an interstate air carrier. No such evidence was in the record.

She attempts to bolster her position by arguing that Mr. Buist's death in Canada "caused an effect" in California in that she now is a widow. (R.P.I. Br. at 11). A similar "effect" would be present in *every* out-of-state personal injury suit, so that it reasonably could not provide a meaningful standard for jurisdiction. A similar argument was addressed and rejected by the California courts in *Kaiser Aetna v. Deal,* 86 Cal.App.3d 896, 150 Cal.Rptr. 615 (1978), absent actual intent to cause the "effect." See also *Leasco Data Processing Equipment Corp. v. Maxwell,* 468 F.2d 1326, 1341 (2d Cir. 1972). If anything, respondent's arguments underscore the lack of clarity of the law in this area.

CONCLUSION

The issue presented by this Petition is whether a Canadian defendant may engage in business dealings with an American citizen in Canada without thereby being forced to litigate a resulting lawsuit in the United States. It is not so much an issue of "reasonable business expectations" as of Constitutional limitations on a State's jurisdictional power. It is a recurring issue which requires clarification by this Court. Petitioner does not seek a rigid or inflexible jurisdictional doctrine, only clear guidelines which would prevent overreaching by state courts. This Petition should be granted so that a full and fair hearing may be had on the issue.

Respectfully submitted,

BARRY L. BUNSHOFT
PAUL D. NELSON
PAUL S. ROSENLUND
HANCOCK, ROTHERT & BUNSHOFT
100 Bush Street, Suite 1600
San Francisco, California 94104
(415) 981-5550
Counsel for Petitioner

February 18, 1981

Appendix

AFFIDAVIT OF HANS GMOSER

I, HANS GMOSER, being duly sworn, depose and say as follows:

1. I am a resident of Harvey Heights, in the Province of Alberta, Canada, and have a relationship with certain companies, all of which are companies incorporated under the laws of the Province of Alberta, with head offices in Banff, Alberta, and are registered as extra-provincial companies in the Province of British Columbia, as follows:

a) President and a Director and a principal, along with my wife and Leo Grillmair, of Brisco, British Columbia, Canada, in Canadian Mountain Holidays Ltd., ("CMH Ltd.");

b) President and Director and a principal, along with CMH Ltd., Charles Barlow, Jr., and Laura Barlow, of Calgary, Alberta, John MacKenzie and Sheila MacKenzie, of Calgary, Alberta, William L. Putnum, of Springfield, Massachusetts, and Anthony Ben Walsh of New York, New York, in Bugaboo Helicopter Skiing Ltd., ("Bugaboo Heli");

c) Secretary Treasurer and Director of Heli-Skiing Cariboo Ltd. ("Heli Cariboo"), the principals of which are Bugaboo Heli and Lloyd Gallaghar of Canmore, Alberta,

d) President and Director of Radium Bugaboo Heli-Skiing Ltd. ("Radium-Heli"), the principals of which are Bugaboo Heli, and Roger K. Madson of Radium, British Columbia.

2. Bugaboo Heli, Heli-Cariboo, and Radium Heli have, for varying periods over the past 15 years, operated facilities for helicopter ski trips, from seven heli-skiing bases, in the Province of British Columbia, as follows:

a) Bugaboo-Heli:

(i) Bugaboo Lodge, owned by Bugaboo Heli, in the Bugaboo Mountains of the Purcell Range;

(ii) Bobbie Burns Camp, owned by Bugaboo Heli, approximately 14 miles north of Bugaboo Lodge, in the Purcell and North Selkirk Mountains;

(iii) Revelstoke, British Columbia, in the Monashee and North Selkirk Mountains, approximately 250 miles northwest of Calgary, Alberta;

(iv) Mica Creek, in the Monashee Mountains, approximately 70 miles northwest of Revelstoke, British Columbia;

b) Heli-Cariboo:

(i) Cariboo Lodge, owned by Heli Cariboo, in the Premier Mountains of the Cariboo Range, approximately 80 miles southwest of Jasper, Alberta;

(ii) Valemount, British Columbia, in the Cariboo Mountains, of the Premier Range, approximately 300 miles west of Edmonton, Alberta;

c) Radium Heli:

(i) Radium, British Columbia, in the Purcell Range, approximately 120 miles southwest of Calgary, Alberta.

3. CMH Ltd. has never engaged in any active business but has been and is used only as a holding company for its interest in Bugaboo Heli. It has had no dealings or activities whatever with U.S. companies, or in the U.S. Its only assets are its interest in Bugaboo Heli aforesaid, and

approximately $1,000.00 cash used to maintain its corporate registrations.

4. Bugaboo-Heli, Heli-Cariboo, and Radium Heli, operate helicopter skiing facilities from the bases set out above, separately, in the sense that they receive all the revenue, and pay all expenses relating to trips of customers skiing from their respective bases. They operate jointly, however, with respect to all matters outside the actual operations from, and at, the bases, which matters include, administration, promotion, advertising, and handling bookings, sharing the costs thereof according to revenue produced, and operating, at various times, under the names Canadian Mountain Holidays, CMH and CMH Heli-Skiing. From time to time, the name Canadian Mountain Holidays Ltd. may have been used in connection with these joint activities, for example, on the application form sent to the decedent, which will be referred to below, but the reference "Ltd." is in error, and there is, in fact, no involvement by CMH Ltd.

5. For convenience, the three companies, Bugaboo-Heli, Heli-Cariboo, and Radium Heli, acting jointly as described above, whether under the names, Canadian Mountain Holidays, CMH or CMH Heli Skiing, will be referred to as "CMH".

6. CMH have no office, nor place of business, nor assets in the United States, nor are they connected in any way with any heli-skiing or any other operations or business in the United States. Further, they have no business connections, relationships, or contacts whatever in the State of California, nor do they carry on any advertising or promotion in California except as follows:

a) they maintain a mailing list of individuals who have booked trips with them, and various travel agents, which

includes the following travel agents located in California which have actually made bookings with them:

Daman Nelson Travel
Penthouse P
3660 Wilshire Blvd.
LOS ANGELES, California 90010

Daman Nelson Travel
115 Mission Street
SAN FRANCISCO, California 94105

Daman Nelson Travel
5613 Falsom Blvd.
SACRAMENTO, California 95819

Draper World Travel
1333 Camino Del Rio South
SAN DIEGO, California 92108

Geramoni Travel
126 Post Street
Ste. 304
SAN FRANCISCO, California 94108

Hills Travel
470 Howe Avenue
SACRAMENTO, California 95825

North Shore Travel
P.O. Box 858
TAHOE CITY, California 95730

Pallisades Travel
Box 277
PACIFIC PALISADES, California 59801

Piedmont Travel
2067 Mountain Blvd.
OAKLAND, California 94611

Travel Moore
15309 Antioch Street
PACIFIC PALISADES, California 90272

World Travel
154 - 77 Ventura
SHERMAN OAKS, California 91403

Each year CMH send copies of their annual brochure to each of the individuals and travel agents on the mailing list, and, upon request, forward additional copies and/or any other promotional material requested. Exhibit "A" is a true copy of their brochure for the 1978/79 season. There are no written agreements with any of the individuals or travel agents referred to but in the event any of the travel agents refer a customer to the Company, or an individual books, and makes all arrangements for a group of more than 10 people, they would retain 10% of the price of the package. This I understand to be the common practice in the travel industry for any type of tour, be it heli-skiing or otherwise. There is no understanding between CMH and any of the individuals or travel agents that any of them have any exclusive right to book tours with CMH, nor do any of the individuals or agents have the authority to confirm bookings. All confirmations are made by CMH employees, in its office at 217 Bear Street, P.O. Box 1660, Banff, Alberta, Canada.

b) they do no direct advertising in California, nor do they advertise in any publication connected with the travel agents, but do place advertisements in several national publications which would have some circulation in the State of California, such as "Ski Magazine", "Skiing", "Powder Magazine", and "Fortune". The approximate annual cost for such advertising in the United States is in the order of $20,000.00. They also arrange each year with Target Travel Show & Displays, a division of Target Advertising, P.O. 1076, Antioch, California, for that Company to distribute CMH brochures at small ski shows and various ski shops in various parts of California. In addition to advertising, CMH each year send a representative to several States, including California, with a ski film or films, which are shown privately, that is, by invitation,

to interested individuals. The cost of this trip, with respect to California, to CMH, normally amounts to approximately $3,000.00, each year.

7. I have examined various records of the Company, which indicate the decedent, Ian Neville Peter Buist, had booked a trip with CMH on one previous occasion, at the Cariboo Lodge, February 18 - 25, 1978. He would automatically go on the CMH mailing list, as a result, but before any material had been sent to him, his reservation for 1979 was made, for the Cariboo Lodge, January 20 - 27, 1979, by a friend, Tom Gerrity, by way of a telephone call, on the 27th day of February, 1978. The call was made from Boston, Mass. and was noted by Dorothy Descheneau, in the CMH office in Banff, Alberta. Exhibit "B" is a true copy of her note relating to the call. She then forwarded the Company's standard application to the decedent, which he completed and returned, such forwarding and return being the first communication, to or from the decedent, in the State of California. Exhibit "C" is a true copy of such application as received March 11, 1978, by CMH. CMH then, in October, 1978, forwarded their standard "Request For Final Payment" Form, which was received, completed. A true copy of this form is Exhibit "D". Accompanying Exhibit "D" was the decedent's payment in the amount of $1,330.00, Canadian, which was acknowledged by CMH by letter, a true copy of which is Exhibit "E". Finally, CMH confirmed the decedent's reservation, and advised of arrangements for accommodation in Edmonton, and bus transportation from Edmonton to Valemount, a true copy of which confirmation is Exhibit "F". The decedent was picked up by bus as arranged, and transported to Valemount, and from there flown by helicopter to the Cariboo Lodge on January 20th, 1979. On January 20th, the dece-

dent, informally, met the guides employed by Heli Caribou, and on Sunday, the 21st, was put into one of several groups, and briefed on safety practices around helicopters and the use of skadi avalanche rescue beacons. He then skied with various groups and different guides January 21 - 26 inclusive.

8. Immediately following the accident in question herein, I visited the site and questioned everyone involved and believe the sequence of events to have been as follows: On the afternoon of January 26, 1979, the decedent skied with a group of 11 guests and a guide, Ray Ware, of General Delivery, Banff, Alberta, employed by Heli Cariboo. Ware was certified as an assistant guide by the Association of Canadian Mountain Guides, and was fully qualified to guide the group in question. Because of high avalanche hazard, most of the skiing that day was conducted in treed areas. All of the skiers in the group, including the decedent, were warned of the risks involved in skiing in treed areas, including the risk of falling in the depressions in the snow formed around trees. Also, the members of the group were instructed to ski at all times with one other person, known as a "buddy". The theory of this instruction was that each skier would maintain an awareness of the whereabouts of one other skier, namely, his "buddy", and the risk of anyone becoming separated from the group was thereby minimized. To further minimize the risk, the guide caused the whole group to regroup several times during each run. Approximately 3:15 p.m., about two-thirds of the way down a run known as "Cruncher", the decedent's buddy, Lee Cullen, fell. The decedent carried on ahead, possibly at the suggestion of Cullen. Cullen recovered his ski and skied down to where the whole group was waiting, but discovered the decedent had not appeared. Rescue efforts, including a

sweep of the run with skadis was immediately undertaken. At approximately 4:10 p.m., the decedent was found at the base of a tree, but he was dead.

9. The members of the group in which the decedent was skiing and those additional persons involved in the search for the decedent, and others in the employ of Heli-Cariboo who might be expected to be witnesses in this action are as follows:

Andre Paquin
10 rue Sylvan
DRUMMONDVILLE, Quebec
J2C 5R8

Mario Menard
c/o Verchare & Gautheir
Suite 1608, 1 Place Ville Marie
MONTREAL, Quebec
H3B 2B6

Don and Barbara Guild
1920 Strand
HERMOSA BEACH, California 90254

James Catlow
12313 Laurel Terrace Drive
STUDIO CITY, Ca. 91604

Fred Cooke
2600 S. Yosemite
DENVER, Colo. 80237

Michael D. London
160 Santa Rosa
SAUSALITO, Ca. 94965

Tom Gram
1 Markep Plaza
Spear St. Tower 221
SAN FRANCISCO, Ca. 94105

Robert Kelley Sr. & Robert Kelley Jr.
1475 W. Delta Drive
SAGINAW, Mich. 48603

Lee Cullen
3300 Lakeshore Drive
CHICAGO, Ill. 60657

William Kessler, M.D.
35 Hyde Lane
WESTPORT, Conn. 06880

Jim Schadt and Marcel Burrel
c/o Piedmont Travel
2067 Mountain Blvd.
OAKLAND, Ca. 94611

Ray Ware
P.O. Box 2175
545 Buffalo Street
BANFF, Alberta
TO1 OCO

Edi Bohren
Mass-Schuhel/Gysidorf
3818 Grindewald
Switzerland

Reinhold Plankensteiner
c/o Box 1660
BANFF, Alberta

10. The original of all exhibits will be available for inspection by the Court at the Hearing herein.

11. Except where indicated otherwise, all of the foregoing facts are within my personal knowledge, and if called as a witness, I could testify competently thereto.

Executed at Banff, Alberta, Canada.

HANS GMOSER
Hans Gmoser

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 18 DAY OF APRIL, A.D. 1980.

A NOTARY PUBLIC in and for the
Province of Alberta.
DONALD I. MACLEOD
DONALD I. MACLEOD

CERTIFICATE OF SERVICE

I hereby certify that on this eighteenth day of February, 1981, three copies of the Reply Brief in Support of Petition for Writ of Certiorari were mailed, postage prepaid, to the Superior Court of California, County of Alameda, 1225 Fallon Street, Oakland, California 94612, Respondent herein, and to Thomas G. Smith, Law Offices of Gerald C. Sterns, 490 Pacific Avenue, San Francisco, California 94133, counsel for Real Party in Interest. I further certify that all parties required to be served have been served.

BARRY L. BUNSHOFT
100 Bush Street
San Francisco, California 94104
Counsel for Petitioner